IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 821 of 1997

For Approval and Signature:

HON'BLE MR.JUSTICE J.M.PANCHAL
and
HON'BLE MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

FAGNABHAI UDABHAI

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 821 of 1997
MR U S Brahmbhatt for Appellant
Mr SS Patel, APP for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE J.M.PANCHAL
and
HON'BLE MR.JUSTICE D.P.BUCH

Date of decision: 17/06/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE D.P.BUCH)

The present appeal, under section 374 of the Criminal Procedure Code, 1973, has been filed by the original accused in Sessions Case No.10/97 before the learned Addl.Sessions Judge, Sabarkantha at Himmatnagar, who recorded an order of conviction and sentence against the present appellant for an offence punishable under section 302 of IPC and the appellant was sentenced to suffer R.I. for life. The appellant was however, acquitted of offence punishable under section 135 of Bombay Police Act.

2. It was alleged against the present appellant that the son of the present appellant had taken away a sword of the deceased who was a resident of village Chandrana (Khanighanti) in Khedbrahma Taluka of Sabarkantha district. The deceased insisted that the sword be returned to him. However, the said sword was not returned by the son of the appellant to the deceased.

3. Since the deceased was insisting on the return of the said sword and was remanding the appellant also, on 7.10.1996 at about 11 a.m. when the deceased had gone with his wife to take bath at a lake in the outskirts of the village, the appellant had also gone there with his buffaloes. At that point of time, the appellant dealt a stick blow on the head of the deceased. He also threw some stones at the deceased. As a result of the injury on the head, the deceased fell down on the ground and succumbed to the injuries on the spot.

4. The daughter of the deceased had gone to one Hirabhai Parmar and had informed him about the aforesaid incident. Hirabhai Parmar went to the spot and enquired from the deceased as to what had happened. The deceased told him that he had come to the lake with his wife for taking bath and at that time, the appellant had also come there with his buffaloes. That at that time, the appellant dealt a stick blow on the middle of the head of the deceased and the deceased sustained aforesaid injury on his head. In a few minutes, the deceased succumbed to the injuries.

5. Thereafter, Hirabhai Parmar went to the police station and filed FIR before the police station. There the informant described the incident saying that the appellant had dealt stick blow on the head of the deceased and, therefore, the deceased had died on the spot.

6. On receiving FIR, offence was registered and the investigating police officer proceeded to investigate the offence. Inquest was prepared, panchnama about scene of offence was also drawn. Statements of witnesses were recorded. In the meantime, the appellant also filed one FIR. A copy of which has been placed on record by the learned Advocate for the appellant before the trial court which has been taken on record by the trial court. However, it seems that the appellant did not prove it and, therefore, it has not been brought in evidence.

7. Thereafter, the appellant was arrested. The clothes put on by him were ceased. The appellant had shown readiness to discover the stick allegedly used by him for committing the offence in question. He took panchas and the police to his residence and discovered the stick which was ceased by the police by drawing a panchnama. Blood stained and other articles were ceased. Blood stained articles were referred to FSL. Further investigation was undertaken. Statements of other witnesses were recorded. Report of the FSL was obtained and after completing the investigation, charge sheet was submitted before the learned Judicial Magistrate First Class at Khedbrahma. Since the offence punishable under section 302 of IPC was exclusively triable by a Court of Sessions, the learned Magistrate committed the case to the Court of Sessions. There it was registered as Sessions Case No.10/97.

8. On receiving the case papers from the trial court, learned Addl.Sessions Judge, Sabarkantha District at Himmatnagar framed charge against the appellant for offence punishable under section 302 of IPC and under section 135 of the Bombay Police Act at Exh.6. It was read over and explained to the appellant. The appellant pleaded not guilty to the said charge and, therefore, evidence was recorded.

9. During the course of trial, prosecution has examined following witnesses:

PW 1 Dr.Narendrakumar Somaji Exh.11
PW 2 Nathabhai Kodarbhai Exh.15
who prepared map
PW 3 Hirabhai Parmar, informant Exh.18
PW 4 Ditaben, widow of the deceased & eye Exh.20
witness
PW 5 Laliben Monabhai,Daughter-in-law of
decd. and eye witness Exh.21

PW 6 Shardaben Gopibhai, daughter of decd &
eye witness Exh.22
PW 7 Monabhai Gopibhai,son of the decd. Exh.23
PW 8 Bherabhai Surdhabhai, Panch Exh.24
PW 9 Shankarbhai Lukabhai, eye witness Exh.26
PW 10 Kumabhai Bhojabhai, panch witness Exh.27
PW 11 Kasanbhai Ajabhai, panch Exh.30
PW 12 Tejibhai Leebabhai Gamar, panch Exh.32
PW 13 Kasnanbhai Anabhai, panch (hostile) Exh.33
PW 14 Nathabhai Retnabhai, Police stn.Officer Exh.35
PW 15 Kantibhai Navaji, I.O. Exh.36
PW 16 Balwantsingh Jagatsingh, PSI Exh.37

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10. The prosecution also produced on record post mortem note Exh.13, map of the scene of offence Exh.17, FIR Exh.19, panchnama about scene of offence Exh.25, Inquest panchnama, Exh. 28, discovery panchnama Exh.29, panchnama Exh.31 about recovery of clothes of the deceased, panchnama Exh.34 about arrest of the appellant and his physical condition etc. The prosecution has also produced FSL report at Exh.38 onwards. After the evidence was concluded, the learned Judge recorded further statement under section 313 of the Code. Here the appellant had come out with a case that he had not committed any offence. However, no positive defence was placed by the appellant during the course of his statement under section 313 of the Code. The Learned Judge heard the arguments of the learned Advocates for the parties and thereafter, on appreciation of the evidence as aforesaid, the learned Judge came to a decision that the appellant had committed murder of the deceased and since the offence provided for minimum sentence of imprisonment of life, the learned Judge found that it was not necessary to hear the appellant with respect to the quantum of punishment and, therefore, inflicted life imprisonment on the appellant.

11. Feeling aggrieved by the said judgment and conviction order dated 16.8.1997, the appellant has preferred this appeal before this court. It has been mainly contended here that the trial court has committed serious illegalities in committing offence under section 302 of IPC. The trial court has not properly appreciated the evidence on record. That the witnesses have given contradictory versions and, therefore, the trial court ought to have rejected the evidence of the witnesses. That there is discrepancy in the timings on record and the timings given by the witnesses during the course of their evidence and, therefore, this discrepancy should lead to acquittal of the appellant. That on the whole, appreciation of evidence is not proper and legal and,

therefore, at least benefit of doubt should have been extended to the appellant. That therefore, the judgment and conviction order recorded by the trial court is illegal and deserve to be quashed and set aside. The appellant has, therefore, prayed that the present appeal be allowed, judgment and conviction order be set aside and the appellant may be acquitted of the offence punishable under section 302 of IPC and he may be set at liberty forthwith.

12. On receipt of the appeal, it was ordered to be admitted on 17.11.1997. When the matter was placed for final hearing, it was argued strenuously by Mr Brahmbhatt, learned Advocate for the appellant that the trial court has committed serious error in convicting the appellant. On the other hand Mr S S Patel, learned APP has supported the judgment and order at the final hearing.

13. As stated above, it was the case of the prosecution against the appellant that there was some sort of previous rivalry between the appellant and the deceased. It seems to be a very short point. The son of the appellant had taken away a sword of the deceased and the deceased was remanding to return it. It seems that some panchas were appointed for resolution of the said dispute and it was ruled that son of the deceased should handover the said sword to the deceased. However, the appellant declined to return the said sword to the deceased. This was a small dispute between the appellant and the deceased. With respect to the incident in question, it seems that on 7.10.1996 at about 10 a.m. the deceased and his wife Ditaben both had gone to a lake for taking bath. At about 11 a.m. the appellant also went to the said lake with his buffaloes. The deceased was accompanied by his wife and daughter Sharda. The appellant enquired as to who was taking bath at which the deceased told that he was taking bath at the said point of time. At that point of time, the appellant went to the deceased with a stick and stones in his hand. Initially he threw stones at the deceased and, thereafter he inflicted stick blow on the middle of the head of the deceased. Wife of the deceased was also present there. She raised shouts at which Shankarbhai, PW 9 and Laliben PW 5 both had rushed to the spot. The deceased tried to run away from the spot probably with a view to see that he did not get further injuries at the hands of the appellant. Ultimately, the deceased fell on the ground and succumbed to the injuries.

14. In the meantime, the daughter of the deceased

went to the informant and informed him about the above incident at which informant-Hirabhai Parmar went to the spot and saw that the deceased was lying on the ground. He enquired from the deceased as to what happened at which the deceased had told him that the appellant had caused the above injury on his head. The informant further enquired as to why he was beaten up by the appellant at which the deceased told him that there was a dispute about a sword and, therefore, the appellant had caused the aforesaid injury to him. Thereafter he tried to give water and the deceased became unconscious and ultimately the deceased died on the spot and the informant went to the police station and lodged FIR.

15. Since the appellant has been convicted for offence under section 302 of IPC, it would be necessary for this court to consider as to whether the deceased died a homicidal death. The trial court has recorded finding that the deceased died a homicidal death.

16. In order to appreciate this position, we can refer to the evidence of Dr.Narendrakumar Somaji at Exh.11. He has very clearly deposed before the trial court that he had received the dead body of the deceased on 8.10.1996 at 7 a.m. That he started post mortem examination of the dead body of the deceased on that day at 7 a.m. on 8.10.1996 and completed at 9 a.m. He has further stated during the course of his evidence that he noticed the following injuries on the person of the deceased:

"1. Vertical C.L.W. 5 cm x 1 cm x bone deep
on the middle of the head. ?depressed
communited # middle of the head.
2. obligne C.L.W. 2 cm x 1 cm x bone deep
on the Rt.temporal region.
3. Vertical C.L.W. 2.5 cm x 0.5 cm x 0.5
cm. above the lt. eyebrow.
Above injuries occur 19 to 20 hour prior to p.m.
examination and may occur by hard and blunt
substances."

17. The Doctor has further deposed during the course of his evidence that the deceased had depressed communited fracture on the middle of the head. With respect to the cause of death, the opinion given by this expert witness is as follows:

"The cause of death as under:
Injury to the vital organ brain leading to
haemorrhagic shock and death."

18. This witness has been cross examined on behalf of the appellant and attempt was made to show that a person receiving such an injury would become unconscious immediately. Attempts have also been made to show that this can be an accidental injury. However, the Medical Officer has negatived the said suggestion. An important factual aspect has also come out during the course of his evidence wherein he has definitely stated that the brain and the cover of the brain were totally crushed and the brain had come out of the said cover. Looking to the evidence given by the Medical Expert and looking to the cause of action opined by them, it is clear that the deceased died homicidal death. Apart from the aforesaid, there is evidence of eye witnesses who have consistently deposed that the appellant dealt stick blow on the head of the deceased and he succumbed to the injuries on the spot. There is no dispute that the deceased died on the spot within few minutes of the incident. Looking to the oral evidence of witnesses and considering the medical evidence, it is clear that the deceased died homicidal death. It seems that there was no serious dispute about this aspect of the case. Even before this court, learned advocate for the appellant has not seriously disputed this aspect and, therefore, this court is of the opinion that the trial court was justified in holding that the deceased died homicidal death. The second question would be whether the deceased died on account of injury sustained by him and whether the injury was inflicted by the appellant.

19. The trial court has found that the appellant had intentionally caused the aforesaid injury and the injury was sufficient in the ordinary course of nature to cause death to the deceased and, therefore the trial court came to a finding that the appellant had committed murder of the deceased. In order to appreciate the above position, we may be required to consider the evidence on record of PW 3 Hirabhai Parmar at Exh.18 who is the informant. However, he is not an eye witness to the incident. He has deposed that since he was informed about the incident, he rushed to the spot and, there he saw the deceased lying on the ground with injury on his head. He has also deposed before the trial court that he enquired from the deceased as to how the incident took place, at which the deceased replied that the appellant had caused the above injuries and he had further stated to him that the appellant had caused the said injury on account of the dispute about the sword. This aspect has been deposed by the informant at exh.18. It is required to be considered that the FIR has been filed by this informant

without any loss of time on the same afternoon and the FIR Exh.19 completely corroborates the testimony of this witness. The witness was cross=examined at length and efforts were made to twist his evidence. However, looking to the cross examination, the witness has stood test of cross examination and his evidence has not been shaken to any extent during the lengthy cross examination. This shows that the incident was immediately reported to the police station by this witness and there the name of the appellant was clearly indicated. It is also required to be considered that the aforesaid dying declaration was made by the deceased to the witnesses-informant even according to the FIR. This would further show that the dying declaration was already on record with the police station in the FIR filed by this witness including the names of eye witnesses particularly wife of the deceased. Daughter Sharda was also shown as eye witness on record. These facts clearly go to show that at the very first moment, everything was disclosed to the police without any loss of time. Therefore, evidence of the informant supported by his FIR clearly gives support to the case of prosecution. This also shows that the informant had no time to concoct a story and file false FIR. Names of eye witnesses were disclosed which would further show that the story narrated by the informant in his FIR is true and genuine.

20. Then there is evidence of Ditaben at Exh.20. She is the widow of the deceased. According to her evidence, she had accompanied the deceased at the time when the incident took place. She being the wife of the deceased, would be a natural eye witness to the incident. Laliben, daughter-in-law of the deceased at exh.21 has also stated that she was present at the time when the incident took place. She has also disclosed name of Ditaben, as co-eye witness. Then there is the evidence of Shardaben at exh.22, who happens to be daughter of the deceased. She has also stated in her evidence that she had gone to the lake of the village to take bath at 10 a.m. Then we find evidence of Shankarbhai at exh.26 who has also testified before the trial court. He was the eye witness on the spot when the incident took place.

21. It shows that all the eye witnesses have categorically disclosed their presence at the very first moment. If we go through the evidence of these witnesses, it is very clear that Ditaben Gopibhai at Exh.20, widow of the deceased, clearly deposed during the course of the evidence that the appellant had inflicted stick blow on the head of the deceased. She also deposed that the appellant threw stones at him. She has said

that she had raised shouts and, therefore, other persons including her brother-in-law and son had also come to the spot. She has also disclosed presence of Shardaben, her daughter on the spot. As stated above, her evidence is very much genuine and natural. She, being the wife of the deceased, would naturally be in company of his husband as and where the deceased would proceed.

22. The witness has also been cross examined at length on behalf of the appellant. An attempt was made to show that the deceased was in the habit of taking liquor and he used to quarrel with many persons and he fell down on the ground and sustained injuries. However, this witness stuck to her case that the deceased died on account of injuries inflicted on the head by the appellant.

23. It is very clear, according to the evidence of the Doctor supported by post mortem, note that the fatal injury sustained by the deceased was right on the top of the head of the deceased. It would, therefore, be very difficult to accept that the said injury could be caused by a fall.

24. Moreover, the injury was fatal and the brain with its outer cover was crushed and said part of the brain had come out of the brain cover. Looking to the injury, it would be difficult to accept that the said injury could have been caused as suggested by the learned Advocate for the appellant during the cross-examination of the wife of the deceased.

25. The above evidence of the widow of the deceased has been supported by the evidence of Laliben Exh.21, who happens to be the daughter-in-law of the deceased. She has also deposed that the appellant had inflicted a stick blow on the head of the deceased and also caused injuries by means of stones. She has also stated before the trial court that the deceased died on the spot after some time. She has further stated that informant-Hirabhai Parmar had also come to the spot and, thereafter, he had filed FIR. This witness was also cross-examined at length and attempts were made to show that she was not an eye witness to the incident. However, during the course of lengthy cross examination, the learned Advocate could not gather anything else and her evidence was not shaken to any extent. She has denied that she was at her residence when the incident took place and that she was not an eye witness to the incident. On the other hand, her evidence completely corroborates the testimony of Ditaben, widow of the deceased and third eye witness-Shardaben. She has

also testified before the trial court that the appellant had dealt stick blow on the head of the deceased and, therefore, the deceased fell on the ground and succumbed to the injuries. She has further deposed that she was near the deceased at the time when the deceased sustained injuries. All those witnesses have identified the clothes of the deceased put on by him at the time when the incident took place. This witness was also cross examined at length on behalf of the appellant. A suggestion was made that she had not stated to the police that she was near the appellant at the time when the incident took place and/or that she was not very near at the time when the incident took place. However, there is no other contradiction in her evidence which shows that she was also an eye witness to the incident and the said fact was conveyed by her to the police even when her statement was recorded on the date of the incident itself. She has also denied that the deceased had fallen on the ground and sustained injuries.

26. Eye witness Shankarbhai at Exh.26 also deposed before the trial court that the appellant had dealt stick blow on the head of the deceased and also the deceased was hit by means of stones. He has also stated that he tried to intervene and ultimately he could not do anything as the appellant tried to beat him also. His evidence has also not been shaken to any extent and he has also stood the test of cross examination. He has also denied that the deceased received injuries due to fall. This shows that all the four witnesses have given consistent evidence before the trial court that the appellant dealt stick blow on the head of the deceased. They have consistently given evidence before the trial court that the deceased died on the spot on account of the said injury. The said fact deposed by these four eye witnesses has been completely corroborated by medical evidence wherein it has come out that the deceased had head injury due to stick blow. This shows that the oral evidence of the eye witnesses has been completely corroborated by the medical evidence. Therefore, there is no reason to discard the evidence of these four eye witnesses.

27. Then, it is a matter of record that the FIR has been lodged without any loss of time. It is true that FIR has been filed by a witness who was not an eye witness to the incident. However, he has given details of the incident and he was given those details by the witnesses who had witnessed the incident. On the top of it, the informant has also given details about dying declaration made by the deceased. It is very clear that

the fact of dying declaration find place in the FIR. Therefore, it cannot be said that the oral dying declaration given by the deceased to the informant has been introduced as an after thought. It is true that the eye witnesses have not given evidence about the aforesaid oral dying declaration. However, it seems that the informant could be very near to the deceased and the deceased may have conveyed the dying declaration to the informant in a very low tone and, therefore, the other eye witnesses might not have properly heard the same. Even otherwise, it is required to be considered that as per the practice in the Court, the witness is required to be put to questions. In other words, if no question has been put to them about the dying declaration said to have been made by the deceased to the informant, then in that event, the witness may not have volunteered to depose the same before the trial court. Even otherwise, it appears that the witnesses who have been examined before the trial court are rustic villagers. They are found to be illiterate and therefore, sometimes, it would be difficult to except them to give the entire story in a particular manner. Any way, the fact remains that the story about the oral dying declaration was conveyed to the police immediately after the incident and it has been substantiated by the oral evidence of the informant. Therefore, the trial court has acted upon the said oral dying declaration of the deceased made to the informant. Looking to the aforesaid surrounding circumstances and looking to the nature of evidence of the informant and the medical evidence, this court is of the opinion that the deceased did make a dying declaration and the trial court was justified in acting upon the same.

28. Even otherwise, the informant was a closed relative of the deceased. It is for this reason that he was immediately conveyed the incident in question and he rushed to the spot. It was quite natural that he would enquire from the deceased if the deceased was alive and was able to reply. Therefore, the oral dying declaration said to have been made by the deceased to the informant is a natural phenomenon and therefore, it cannot be rejected simply because the other witnesses have not spoken about the same. It is more so, when it has been disclosed to the police at the very first moment when other things have not come on record. This shows that oral evidence of the four witnesses has been amply corroborated by the aforesaid oral dying declaration made by the deceased to the informant. Law of dying declaration is very well settled. When it is found that dying declaration is found to be true and genuine and if it is found to have been voluntarily made by the

deceased, then it is always admissible in evidence. It is also relevant for the purpose of finding out the cause of death of the deceased. It is not much in dispute that the injury sustained by the deceased on his head at the hands of the appellant was the cause of the death and, therefore, the oral dying declaration given by the deceased to the informant was really the dying declaration disclosing the cause of his death. It is also well settled that if the dying declaration is found to be genuine and true, then it can be acted upon even without any corroboration, and conviction can be based on such a declaration. In the present case we find that there is oral evidence of eye witnesses about the entire episode and it has been completely corroborated by the aforesaid dying declaration. It is not much in dispute that the dying declaration may be oral or may be in writing. Therefore, even oral dying declaration can also be acted upon if it is found to be true and genuine. In the present case, looking to the surrounding circumstances, the oral dying declaration given by he deceased to the informant is found to be true and genuine. It is also found to be natural. Therefore, this Court is of the view that this oral dying declaration has been acted upon and the trial court was justified on acting upon the same.

29. Then we find evidence of other witnesses also. PW 8, Bherabhai Surdhabhai Exh.24 is a panch witness in whose presence panchnama Exh.25 with respect to scene of offence was drawn which shows that the place was very near to the said lake. It further shows that shoes of the deceased were lying there. Blood stained earth was collected from the said place. This witness has supported the statement of fact made in the panchnama. Attempt was made to argue that the witness has deposed before the trial court that the police had obtained signatures on the paper slips but the witness did not know what happened to the said slips. It is a matter of record that the incident took place in the beginning of October, 1996 and the evidence was recorded in June, 1997 and, therefore, there was a gap of nearly seven months and therefore, all the witnesses cannot be excepted to have similar strength of memory. The witnesses are therefore, not expected to remember every inch of the incident. Any way, it has been mentioned in the panchnama Exh.25 that those slips were affixed on the muddamal articles. Kumbhabhai Bhojabhai, Exh.27 is another panch witness to witness the panchnama Exh.28. So far as the inquest panchnama is concerned, it shows the condition and position of the deceased. So far as his injuries are concerned, they have been described in

the panchnama. They have further been proved by medical evidence. He also deposed that muddamal stones etc. were seized by the police from the scene of offence. Therefore, the factual statements of panchnamas are proved by these witnesses at Exh.25 and Exh.29. Kasambhai Anabhai Exh.30 is also a panch witness in whose presence, discovery panchnama was drawn by the Investigating Police Officer. This witness has deposed that the appellant had shown his house and muddamal stick-article which was seized from the house of the appellant. The clothes put on by the deceased were seized under panchnama produced at exh.31. Tejibhai P.W. 12 at exh.32 is a panch witness. However, he has not supported the case of prosecution and therefore, he was treated hostile by the prosecution.

30. Kasnambhai Anabhai Exh.33 is again a panch witness. He has deposed before the trial court that the clothes on the person of the appellant were seized. They were stained with blood. He has produced panchnama at exh.34. Panchnama at Exh.34 shows that the clothes put on by the appellant at the time of his arrest were stained with blood.

31. PW 14 Nathabhai Ratnabhai Exh.35 has deposed before the trial court that he was P.S.O. at the relevant time, on 7.10.1997. He deposed that the informant had lodged FIR which was reduced into writing by him and it was read over to the informant and thereafter his signature was obtained below the said FIR. He has denied that the FIR was registered by him without any information received from the informant. He has also denied that the FIR was not registered according to the instructions of the informant. After all he is a Police Officer working in police station since long. There is no reason for him not to record the FIR, if it was really not given by the informant. Even from his cross examination, this fact did reveal.

32. PW 15, Kantibhai Navaji At Exh.36 was a police officer at the relevant time. When the FIR as reduced into writing by the previous witness, the investigation was handed over to this witness at 14.00 hours. He had drawn inquest panchnama of the dead body. He also drawn panchnama of the scene of offence. He also recorded statements of witnesses and the remaining investigation was handed over to the PSI. This witness was cross examined on behalf of the appellant. He had deposed that he has not brought the police station dairy. He has denied the fact that the muddamal article was subsequently introduced in the panchnama. The panchnama

does not indicate that there was subsequent manipulation in the said panchnama. Therefore, this suggestion is found without any value. He has also denied that the statement of the widow of the deceased was recorded by him and that it was not given by the widow to him. He has also denied that though the widow was not present at the time when the incident took place, she was falsely introduced as eye witness to the incident. Now this suggestion is without any value. The reason is that this informant had disclosed right from the first inception that the widow of the deceased was present when the incident took place. Therefore, there was no scope for this witness for subsequent introduction of the widow as an eye witness.

33. PSI, PW 16, Balwantsingh Exh.37 has substantially investigated the case. He has recorded statements of the witnesses and has drawn panchnama about discovery of muddamal stick. This witness has deposed that the appellant had shown readiness and willingness to discover muddamal stick from his residence. That thereafter, the appellant had taken them to his residence and produced muddamal stick which was seized by the police under panchnama.

34. Discovery of muddamal article is a fact relevant under section 27 of the Evidence Act. It is required to be considered that when evidence of discovery of an article has come on record, then it may suggest the following alternatives:

i. That the muddamal article was placed at the said place by the concerned accused person;

ii. Somebody informed the accused that muddamal article was lying there;

iii. Accused has seen somebody placing the muddamal article at the said place.

35. It has not been the case of the appellant before the trial court that somebody had told him that the muddamal stick was lying there. It has also not been the case of the appellant before the trial court that somebody had told him that the muddamal stick was lying there. Therefore, the third option would be that the appellant had placed the muddamal stick at the said place which is required to be accepted.

36. Evidence about the discovery of muddamal article

may not be substantive and conclusive evidence against the accused persons. However, it may lend corroboration to the case of the prosecution. In the present case, we find that the witnesses have categorically deposed before the trial court that the muddamal stick was used by the appellant in inflicting blow on the head of the deceased. The said muddamal article has been discovered by him. This shows that there was a link between the crime, the weapon seized and the appellant. At the same time, the FSL report shows that the muddamal stick had blood group of AB. It seems that this was not the blood group either of the deceased or of the appellant. Therefore, the blood of the deceased might not have touched the stick. Any way, it has come on record that this muddamal stick was discovered by the appellant voluntarily.

37. Therefore, it is a matter of record that there is evidence of four eye witnesses who have given consistent evidence in the trial court to the effect that the appellant had hit a stick on the head of the deceased. Evidence shows that the brain of the deceased was crushed and even the outer cover of the brain was crushed and the crushed part of the brain had come out of the brain which clearly shows that the deceased died on account of the aforesaid injury and the injury was sufficient in the ordinary course of nature to cause death to the deceased. There is evidence to show that there was some motive on the part of the appellant in committing the offence in question as his son had taken away a sword of the deceased and the appellant did not want to return it to the deceased. The deceased had demanded it time and again. Panchas were appointed and, therefore, there was some pressure on the appellant for the return of the sword. Therefore, he must have felt annoyed knowing that he would be required to return the said sword. Therefore, with a view to avoid such an event, the appellant inflicted blow with stick on the head of the deceased.

38. In case of direct evidence, the motive may not be very important and main aspect. However, when motive is there, it will have some effect on the case of the prosecution. In the present case we find that there was motive on the part of the deceased in committing the offence in question.

39. The above facts and discussion go to show that the appellant did inflict stick blow on the head of the deceased and this resulted in the death of the deceased on the spot. A question could arise as to whether this can be treated to be an offence of murder or it may

amount to culpable homicide not amounting to murder and as to whether it may fall under section 302 of IPC, whether it would fall under section 304 part I or Part II of IPC.

40. In this connection, we have to consider the nature of the injuries sustained by the deceased. In the present case, we find that the injury was dealt on the top of the head of the deceased. The blow was very forceful and the result was not only fracture in scull bone but the injury further penetrated inside the brain and the brain was also crushed. The brain was crushed in such a manner that the brain and the brain cover both were crushed and the crushed part of the brain had come out of the outer cover. This shows that the blow inflicted was extremely forceful.

41. The intention of the accused is also required to be considered. Here, we find that looking to the forceful blow inflicted by the appellant on the head of the deceased, it clearly shows that the appellant intended to inflict a forceful blow and the blow inflicted by him was really intended to be inflicted by him. In other words, the appellant had intentionally caused murder of the deceased by inflicting very forceful blow on a vital organ of the body of the deceased. Even the thickness of the stick also suggests that the appellant did have an intention to cause the death of the deceased.

42. Learned Advocate for the appellant has tried to argue that there was some discrepancy about timings of the incident in question. It is true that at some places, the witnesses have said that the incident took place at 11 a.m. and at some places it is said to have taken place at 12 noon. It is required to be considered that the witnesses are rustic villagers. They are illiterate. They do not put on watch on their wrist. They may not have watch or clock at their house also. In that view of the matter, when the timings given by different witnesses, it has to be accepted that they were approximate timings given by them and, therefore, if there is some difference here or there, that would not go to the root of the case of the prosecution. It has, then, been pointed out by the learned Advocate for the appellant that the incident took place in presence of three or four witnesses and none had intervened. It has, therefore, been argued by him that the presence of the witnesses is not natural and, therefore, their evidence should not be accepted.

43. Now so far as Shankarbhai, PW9, Exh.26 is concerned, he has definitely deposed before the trial court that he tried to intervene but as the appellant also tried to attack him and he had no option or alternative. It shows that at least one witness has tried to intervene but he could not. So far as the other witnesses are concerned, they are all family members. One is the widow, second one is the daughter, third one is the daughter-in-law of the deceased. According to the evidence, the appellant had a stick with him. Even they may be frightened. Different persons will have different reactions at different times and in different circumstances. Some persons may try to intervene, some persons may not try to intervene and some persons may be frightened and some may even be shocked. Therefore, different persons would react in different circumstances in different manners. Therefore, simply because three women eye witnesses did not actively intervene in the episode, it cannot be said that they were not present at the time when the incident took place and they were not natural eye witnesses.

44. It has also been argued that Shankarbhai, PW 9 was not a natural eye witness and he was only a chance witness. Now this witness has deposed that it was about 10 to 11 a.m. when he was washing clothes at the lake. The lake was meant for taking bath and washing clothes. Therefore, many persons would gather together for both washing and bathing. This shows that the presence of Shankarbhai PW 9 was quite natural and, therefore, he could not be branded as a chance witness. It can be inferred that many persons would daily or regularly be coming to the lake for the above purpose. Shankarbhai had also gone to the lake for washing his clothes. This being a routine course, this witness cannot be treated to be a chance witness. Even otherwise, his evidence shows that it has not been shaken during the course of cross examination and, therefore, it is not possible for this court to reject his testimony on the ground that he was a chance witness. Further he has also deposed before the trial court, as said earlier, that he tried to intervene but since the appellant tried to beat him, he moved himself little away. An attempt was also made to argue that the evidence is recorded falsely and the witnesses are all near relatives of the deceased and, therefore, it can be discarded. It is required to be considered here that this was an episode where near relatives would be naturally present. Ditaben being the widow of the deceased was present at the spot. She had gone to take bath with the deceased and, therefore, the widow of the deceased, daughter of the deceased and daughter-in-law of

the deceased were quite natural witnesses and, therefore, simply because of their relations with the deceased, their evidence cannot be discarded. It is more so, when their is evidence amply corroborated by the evidence of Shankarbhai, medical officer and post mortem note. It is more so when the said evidence is further corroborated by the FIR which was registered within a span of three hours from the occurrence in question. Therefore, simply because the witnesses are related to the deceased, the trial court was justified in not discarding their evidence on that count. This Court also finds that the trial court has not committed any error in accepting the evidence of the said witnesses. An attempt was also made to show that according to the witnesses, the deceased was hit on his abdomen and no mark of injury was noticed on his abdomen. Now this was a push by a stick. When the deceased had put on clothes on his person then there may not be any resultant visible mark of injury on his abdomen. Therefore, simply because this was not noticed on the abdomen of the deceased, it may not be said that the evidence of eye witnesses should be rejected on the said consideration.

45. This shows that there is evidence of four eye witnesses the evidence has been amply supported by FIR, evidence of Medical Officer, evidence of post mortem note, recovery of muddamal articles and particularly, discovery of muddamal stick. The trial court was, therefore, justified in accepting the evidence of the four witnesses. The Learned Advocate for the appellant, though tried his best, could not convince us to take a view different from the view recorded by the trial court. This court is in general agreement with the reasonings and findings recorded by the trial court. Therefore, this court finds that the trial court was justified in accepting the evidence of the witnesses on record and also the evidence with respect to the dying declaration, post mortem note and discovery panchnama. If once the evidence is found to be acceptable, then there is no alternative but to hold that the appellant committed intentional murder of the deceased. In other words, the trial court was justified in holding that the appellant had committed intentional murder of the deceased and was, therefore, justified in convicting the appellant for an offence under section 302 of IPC. The trial court has acquitted the appellant of offence under section 135 of the Bombay Police Act. Therefore, there is no necessity to touch that aspect of the case. In above view of the matter the trial court has given good many reasons for accepting the evidence of the witnesses and for convicting the appellant for an offence punishable under

section 302 of IPC. This Court finds that the judgment and conviction order of the trial court are legal and proper and no infirmity could be shown either from the evidence or from the judgment and conviction order of the trial court and, therefore, this court finds no merit in the present appeal and, therefore, it deserves to be dismissed.

46. For the foregoing reasons, this appeal is ordered to be dismissed. The impugned judgment and order passed by the trial court are confirmed. The trial court shall naturally dispose off the muddamal article in accordance with the order passed by the trial court.

[J M Panchal, J.]

[D P Buch, J.]

msp